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Supreme Court, U.S.
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No. 97-391

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1997
CERTIORARI GRANTED DECEMBER 5, 1997

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Apr. 24, 1996—Plaintiff Ashmus's complaint filed in U.S. District Court for the Northern District of California

Apr. 26, 1996—Order entered directing defendants to show cause

May 3, 1996—Temporary restraining order entered

May 14, 1996—TRO orally extended 10 days

May 15, 1996—Written Order entered extending and modifying TRO

May 24, 1996—Order entered granting plaintiff's requests for provisional class certification, for declaratory relief, for preliminary injunctive relief, and for *in forma pauperis* status, and denying defendants' motion to dismiss

May 31, 1996—Defendants' answer filed

June 14, 1996—Opinion of the District Court filed

June 17, 1996—Defendants' notice of appeal filed

August 18, 1996—Opinion of the Court of Appeals for the Ninth Circuit filed

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[FILED APR. 24, 1996]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, Plaintiffs, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, TEENA FARMON, Warden of the Central California Women's Facility, JAMES GOMEZ, Director, California Department of Corrections, and DANIEL LUNGREN, Attorney General of the State of California, Defendants.	Case No. [C 96-1533 TEH] **CLASS ACTION** **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (CIVIL RIGHTS)**

Plaintiffs allege as follows:

INTRODUCTION

1. This is an action, brought pursuant to 42 U.S.C.

§ 1983, for declaratory judgment and injunctive relief, challenging the application to federal habeas corpus proceedings involving California death judgments of certain provisions contained in the "Antiterrorism and Effective Death Penalty Act of 1996," P.L. _____ (hereafter "1996 Act"). The 1996 Act -- which President Clinton signed into law on April 24, 1996 -- contains several amendments to the current habeas corpus provisions in Chapter 153 of the Judicial Code (Title 28) and creates a new Chapter 154 to Title 28, which is entitled "Special Habeas Corpus Procedures in Capital Cases." Chapter 154 provides a system of expedited review and other procedural benefits to States that "opt in" by creating a mechanism for appointing and funding competent counsel to represent condemned prisoners in state post-conviction proceedings. 28 U.S.C. §§ 2261-2266. Plaintiff Ashmus and members of the plaintiff class in this action are individuals currently under sentence of death by the State of California who seek a judicial determination that the State of California does not qualify as an opt-in jurisdiction under Chapter 154.

2. Defendants and their agents have indicated their intention to invoke the provisions in Chapter 154 in all current and future federal habeas corpus proceedings involving California death judgments. The provisions defendants seek to invoke include a six-month statute of limitations for the filing of a petition for writ of habeas corpus, 28 U.S.C. § 2263, restrictions on the federal court's review of substantive constitutional claims, 28 U.S.C. § 2264(b), limitations on the ability to amend habeas corpus petitions, 28 U.S.C. § 2264(b), and severe time constraints on federal court consideration of habeas corpus petitions, 28 U.S.C. § 2266, including but not limited to the requirement that District Courts render final judgments within 180 days of the filing of a petition for writ of habeas corpus in a death penalty case.

3. Contrary to defendant's assertions and threats to invoke Chapter 154, the State of California does not currently provide, and has not previously provided, "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by prisoners whose capital convictions and sentences have been upheld on direct appeal" as provided for in 28 U.S.C. § 2261, or a similar mechanism for indigent prisoners in unitary review proceedings, as defined by 28 U.S.C. § 2265. Indeed, the State of California does not provide, nor has it ever provided, a "State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack" as provided in 28 U.S.C. § 2265.

4. Defendants' threats to invoke Chapter 154 deny plaintiffs their federal rights to redress constitutional violations and create the unacceptable and unlawful situation that death row inmates are forced to litigate state and federal challenges to their convictions and death sentences without knowing whether Chapter 154 properly applies to their federal habeas proceedings. Resolving this fundamental question is essential to ensure that plaintiffs do not unknowingly forfeit vindication of their statutory and constitutional rights. Without a judicial determination of the rights and responsibilities of the parties to this action, state prisoners sentenced to death in California who have meritorious grounds for challenging their conviction and sentence will be left to hazard a guess as to whether, and how, the new legislation affects their ability to seek redress in the federal courts for deprivations of their constitutional rights.

5. Such uncertainty about the application of Chapter 154 is unconscionable given the consequences of

misjudgment and misinterpretation of the controlling law. Without guidance from this Court, state prisoners in federal court challenging their California death sentences must guess whether they have six months to file a petition for writ for habeas corpus, whether they are able to amend any petition that is filed, whether the federal court reviewing their petition will apply a substantive standard that ensures protection of constitutional rights, and whether the additional restrictive procedures contained in Chapter 154 will apply. Without guidance from this Court, death row prisoners not currently in federal court are unable to determine whether they are entitled to the appointment of competent counsel and reasonable litigation expenses envisioned by 28 U.S.C. § 2261, whether the time period for filing any federal petition has already begun to run, or whether they must undertake steps in either state or federal courts to protect their right to review of their constitutional challenges to their convictions and death sentences.

6. Prosecution of this action as a class action is essential to ensure uniform and timely notice of the applicability of the new statute and to permit the fair and orderly resolution of the rights and responsibilities of all parties.

7. A prompt determination of whether the defendants may properly invoke Chapter 154 is also critical for the effective functioning of the federal judiciary. If Chapter 154 applies, federal district courts may be required to adjust their non-capital dockets to resolve federal habeas corpus actions involving capital cases on an expedited basis, as required by 28 U.S.C. § 2266.

JURISDICTION

8. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, as it arises under the Constitution and laws of the United States.

9. This Court also has jurisdiction over this case pursuant to 28 U.S.C. § 1343(a)(3) and (4), as plaintiffs seek to redress the deprivation, under color of State law, of rights, privileges and immunities secured by the Constitution of the United States, and under an Act of Congress providing for equal rights of persons within the jurisdiction of the United States, and because it seeks equitable or other relief under an Act of Congress providing for the protection of Civil Rights.

10. This Court is empowered to declare the rights and other legal relations of the parties herein, by 28 U.S.C. § 2201, and to effectuate and enforce declaratory relief by all necessary and proper means, by 28 U.S.C. § 2202, as this case involves an actual controversy within the Court's jurisdiction. This Court is entitled to order injunctive relief under 42 U.S.C. § 1983, as this action involves the deprivation of constitutional rights by defendants acting under color of state law.

11. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b).

INTRADISTRICT ASSIGNMENT

12. This action arises within the counties assigned to the San Francisco Headquarters and the Oakland Division of this District. Plaintiff and virtually all other members of the plaintiff class and defendant Arthur Calderon reside in Marin County, California.

PARTIES

13. Plaintiff, Troy A. Ashmus, is a resident of the Northern District of California, incarcerated at San Quentin Prison under sentence of death.

A. On July 25, 1986, the Superior Court in and for the County of San Mateo entered judgment of conviction and death sentence against Mr. Ashmus.

B. On March 4, 1987, the California Supreme Court appointed Linda F. Robertson to represent Mr. Ashmus in his automatic appeal of his conviction and death sentence. The order appointing Ms. Robertson read as follows:

> Upon request of appellant for appointment of counsel, Linda F. Robertson, Esq. is hereby appointed to represent appellant on his automatic appeal now pending in this court.

C. On January 29, 1992, the California Supreme Court affirmed Mr. Ashmus's convictions and death sentence when it denied his timely petition for rehearing of the Court's published decision in *People v. Ashmus*, 54 Cal.3d 932, 2 Cal. Rptr.2d 112 (1991).

D. The United States Supreme Court denied Mr. Ashmus's timely Petition for Writ of Certiorari on October 5, 1992. *Ashmus v. California*, 506 U.S. 841, 113 S. Ct. 124 (1992).

E. On February 17, 1993, Mr. Ashmus instituted federal proceedings challenging his conviction and death sentence by filing an Application for Appointment of Counsel and a Request for Stay of Execution in *Ashmus v. Calderon*, No. C-93-0594-TEH. Mr. Ashmus's federal proceedings are currently pending

before the Honorable Chief Judge Thelton E. Henderson.

F. In December 1993, this Court appointed Bernard Zimmerman and Grace Suarez to represent Mr. Ashmus in his federal habeas corpus proceeding. Mr. Zimmerman subsequently was appointed as a United States Magistrate, and this Court permitted counsel to withdraw from their representation of Mr. Ashmus.

G. On August 9, 1995, this Court issued an order appointing Michael Laurence and Jeannie R. Sternberg to represent Mr. Ashmus in his federal habeas corpus proceeding.

H. On December 4, 1995, this Court filed an order extending the stay of execution of Mr. Ashmus's death sentence to and including August 2, 1996, to permit current counsel for Mr. Ashmus to prepare, file, and serve a Petition for Writ of Habeas Corpus.

14. Defendant Arthur Calderon is the Warden of San Quentin Prison. San Quentin Prison houses "death row" for male persons sentenced to death and committed to the jurisdiction of the Department of Corrections and is the location where executions pursuant to California law are carried out. As warden, defendant Calderon is the custodian of all male persons sentenced to death and housed at San Quentin and is the nominal respondent in all federal habeas corpus cases challenging California death sentences of such state prisoners. Defendant Calderon acts under color of state law and is sued in his official capacity.

15. Defendant Teena Farmon is the Warden of the Central California Women's Facility in Chowchilla, California. The Central California Women's Facility houses "death row" for the eight female persons sentenced to death and committed to the jurisdiction of the Department of Corrections. As warden, defendant

Farmon is the custodian of all female persons sentenced to death and housed at the Central California Women's Facility. Defendant Farmon acts under color of state law and is sued in her official capacity.

16. Defendant James Gomez is the Director of the California Department of Corrections. In this capacity and pursuant to California Penal Code Section 5054, defendant Gomez is responsible for the custody of all inmates committed to the jurisdiction of the Department of Corrections. Defendant Gomez acts under color of state law and is sued in his official capacity.

17. Daniel Lungren is the Attorney General of the State of California. As such, he represents the custodians of the state prisoners in all habeas corpus litigation in state and federal courts, as well as in all California direct appeals. Defendant Lungren acts under color of state law and is sued in his official capacity.

CLASS ACTION ALLEGATIONS

18. This action is brought by plaintiff as a class action on his own behalf as an individual and on behalf of himself and others similarly situated, pursuant to the provisions of Federal Rules of Civil Procedure Rules 23(a), 23(b)(1), and 23(b)(2), 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Federal Rules of Civil Procedure Rule 57 and 65, seeking declaratory and injunctive relief and subordinate relief incidental thereto including costs and attorneys' fees.

19. The class so represented by plaintiff in this action and of which plaintiff is himself a member consists of all prisoners who have been sentenced to death by the State of California and are currently awaiting execution pending the resolution of their state and federal challenges to their state convictions and sentences. All members of the plaintiff class have federal constitutional

challenges to advance against their convictions and/or death sentences.

20. The precise number of members of the class is not currently known, but, based on information and belief, it is estimated that the plaintiff class contains at least 439 members. Approximately 125 members are in state court awaiting the appointment of counsel on direct appeal. Approximately two persons are added to the class each month. This number is sufficiently large that joinder of all members is impracticable. The class therefore fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(1).

21. All the questions of law presented by this case are common to all members of the class. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(2). These questions of law include:

A. Whether Chapter 154 of Title 28, as enacted on April 24, 1996, applies to the plaintiffs to the extent that those provisions define rights or specify procedures that are different from the rights and procedures specified in Chapter 153 of the Judicial Code;

B. Whether the State of California has provided "by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal, and "whether under California law, there exists a" rule of court or statute [which] . . . provide[s] standards of competency for the appointment of such counsel" within the meaning of this statute, 28 U.S.C. § 2261;

C. Whether, if so, the State of California's

systemic failure to appoint and compensate counsel, and pay litigation expenses in state postconviction proceedings bars the defendants from invoking the procedures provided in Chapter 154;

D. Whether the State of California's failure to provide counsel in state post-conviction proceedings who is different from counsel in the direct appeal precludes application of Chapter 154;

E. Whether the State of California's failure to provide a unitary review process as defined by 28 U.S.C. § 2265 precludes application of Chapter 154;

F. Whether the defendants should be required to prove that the State of California has adopted and followed the statutes or rules required by Chapter 154, before invoking the procedural protections of Chapter 154.

22. Many of the questions of fact relevant to this case are common to the class. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(2). These questions of fact include:

A. Whether defendants have threatened to assert that the procedures governing the filing and adjudication of federal habeas petitions contained in Chapter 154 apply to all or some members of the plaintiff class;

B. Whether the State of California intends to assert that the post-conviction or unitary review procedures of Chapter 154 apply to all or some members of the plaintiff class;

C. Whether, if the State of California has a mechanism complying with 28 U.S.C. §§ 2261 and 2265, the State of California has complied with the specific requirements of such rule for the appointment,

compensation, and competence of counsel and the payment of reasonable litigation expenses; and

D. Whether, if the State of California has a mechanism complying with 28 U.S.C. §§ 2261 and 2265, the State of California has offered counsel to all state prisoners under capital sentence, as evidenced by the entry of an order by court of record appointing counsel, finding that the prisoner has knowingly rejected the offer, or denying the appointment for lack of indigency.

23. The claims of the representative party are typical of the claims of the class. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(3).

24. The representative party will fairly and adequately protect the interests of the class. Many of the class members have no other means of obtaining representation to protect their rights in this regard. Thus, the class fulfills the requirements of Federal Rules of Civil Procedure Rule 23(a)(4).

25. The attorneys for plaintiffs are experienced and capable of civil rights and capital litigation and have successfully represented claimants in other litigation of this nature.

26. This action is properly maintained as a class action under Federal Rules of Civil Procedure Rule 23(b)(1) inasmuch as the prosecution of separate actions by individual members of the class would create the risk of inconsistent and varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class.

27. This action is also properly maintained as a class action under Federal Rules of Civil Procedure Rule

23(b)(2) inasmuch as the defendants herein have acted, and intend to act, as hereinafter more specifically alleged, on grounds that are applicable to the class, and have by reason of such conduct made appropriate final injunctive relief or corresponding declaratory relief with respect to the entire class, as sought in this action.

FACTS

28. On April 24, 1996, the President signed into law the "Antiterrorism and Effective Death Penalty Act of 1996" (hereafter "1996 Act"). Title I of the 1996 Act, entitled "Habeas Corpus Reform," contains several sections modifying existing habeas corpus procedures in Chapter 153 of the Judicial Code (Title 28). Section 107 of the 1996 Act enacts a new Chapter 154 to Title 28.

29. Chapter 154 contains special procedures for cases involving state prisoners under capital sentences. Title 28 U.S.C. § 2261 provides that the procedures set forth in Chapter 154 are applicable as follows:

> (b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.
>
> (c) Any mechanism for the appointment,

> compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--
>
> > (1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
> >
> > (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or
> >
> > (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.
>
> (d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

30. Section 2261 of Title 28 is commonly referred to as an opt-in provision.

31. The opt-in provisions contained in section 2261

are made applicable to states that provide a system of "unitary review," defined by 28 U.S.C. § 2265 as "a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack."

32. In states that have, and comply with, statutes or court or agency rules fulfilling the opt-in provisions of 28 U.S.C. § 2261 or 28 U.S.C. § 2265, indigent capital prisoners are subject to more restrictive federal rules regarding the time limitations and standards for consideration of federal habeas corpus petitions challenging their capital sentences.

33. The State of California has enacted no rule or statute that complies with either 28 U.S.C. § 2261 or 28 U.S.C. § 2265.

34. The State of California has denied to indigent postconviction petitioners in capital cases, including the plaintiff in this case and other members of the plaintiff class, appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings.

35. The State of California has enacted no statute or court or agency rule that provides standards of competency for the appointment of counsel for indigent postconviction petitioners in capital cases.

36. The State of California has enacted no statute or court or agency rule that ensures that "no counsel appointed to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation."

37. In fact, the State of California has appointed counsel who represented indigent prisoners under capital sentences at trial or on direct appeal, to represent the same prisoners in postconviction proceedings, without any express request for continued representation by the prisoner and counsel.

38. The State of California has provided no procedure that authorizes persons under sentence of death to raise in the course of the direct appeal any claims that could be raised on collateral attack. California State law restricts the claims that may be raised in the course of direct review of the judgment to errors appearing on the face of the trial record, and precludes from collateral proceedings any claims that could have been raised on direct review. The State Supreme Court has exclusive jurisdiction over the automatic appeals of death judgments and exercises original jurisdiction over collateral attacks on capital judgments. The State procedures for review of plaintiffs' cases routinely preclude consolidation of the direct review and collateral proceedings, and deny plaintiffs adjudication of their collateral attacks.

39. Although the State of California has not complied with the terms of this statute, defendants have asserted and threatened to assert, directly and/or through their attorneys, that the State of California has so complied and that plaintiffs and members of the plaintiff class will be bound by the restrictive terms of this opt-in statute.

CLAIMS FOR RELIEF

40. The state authorities' threatened future assertion of Chapter 154 opt-in procedural benefits, and the uncertainty of their application to plaintiff and other members of the plaintiff class, is an unlawful and

unconstitutional attempt to coerce plaintiff and other members of the plaintiff class to forgo the benefits of Chapter 153 of the Judicial Code, and the complete and orderly litigation of their habeas corpus claims, to which they are otherwise entitled. The actions of defendants as alleged above violate plaintiffs' rights under federal law by denying plaintiff and other members of the plaintiff class effective and sufficient access to vindication of federal constitutional violations through the provisions contained in Chapter 153 of the Judicial Code.

41. Plaintiff and other members of the plaintiff class therefore are in jeopardy of suffering an unlawful suspension or restriction of their right to apply for federal habeas corpus relief, without receiving the countervailing protection of the state statutes or court rules required by 28 U.S.C. § 2261 and 2265.

42. Plaintiff and other members of the plaintiff class are entitled to a determination of the applicability of Chapter 154 in order for them to seek redress and effectuate their rights in state and federal proceedings challenging their convictions and death sentences.

43. There is an actual controversy between plaintiffs and defendants with regard to plaintiffs' claims, thereby rendering appropriate a declaratory judgment pursuant to 28 U.S.C. § 2201.

44. Plaintiff and members of the plaintiff class have no adequate remedy at law for these infringements of their rights. Plaintiff and members of the plaintiff class will suffer irreparable injury unless appropriate redress is provided by the Court.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray for all relief that is allowable under the applicable law and is just, including:

45. An order declaring that Chapter 154 of Title 28 is inapplicable to plaintiff and other members of the plaintiff class until and unless defendants demonstrate that the State of California has complied with the requirements of the opt-in provisions;

46. A declaratory judgment declaring that the State of California has not complied with the opt-in provisions of Chapter 154;

47. A declaratory judgment declaring that the provisions of Chapter 154 are not applicable to plaintiff's and other plaintiff class members' federal habeas corpus proceedings;

48. Preliminary and permanent injunction enjoining the defendants from invoking or asserting, in any state or federal proceeding, that the State of California has complied with the provisions of Chapter 154, until such compliance is demonstrated to this Court;

49. Plaintiffs' costs, disbursements, and attorneys fees pursuant to 28 U.S.C. § 1915 and 42 U.S.C. § 1988; and

50. Such further relief as the Court shall find to be just and equitable.

DATED: April 24, 1996. STERNBERG, SOWARDS & LAURENCE

BY: /s/ Michael Laurence
MICHAEL LAURENCE
Sternberg, Sowards & Laurence
Attorneys for Plaintiffs

[SERVICE DOCUMENTATION OMITTED]

[FILED APR. 26, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v,	)	SCHEDULING ORDER
	)	
ARTHUR CALDERON, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

The Court is in receipt of plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief," in the above-captioned case. Good cause appearing, defendants are hereby ORDERED TO SHOW CAUSE at 3:00 p.m., on Thursday, May 2, 1996, in Courtroom 12, located at 450 Golden Gate Avenue, San Francisco, why plaintiffs application for a temporary restraining order and/or temporary declaratory relief should not be granted. Defendant's opposition to the application must be filed and served on plaintiff's counsel no later than 10:00 a.m. on Monday, April 29, 1996.

IT IS SO ORDERED.

DATED 4/26/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

[FILED MAY 3, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v,	)	TEMPORARY
	)	RESTRAINING
ARTHUR CALDERON,	)	ORDER
et al.,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief." On May 2, 1996, the Court held a show cause hearing, having previously ordered defendants to respond. At the close of the hearing, having carefully considered the parties oral and written arguments, and good cause appearing, the Court granted plaintiff's application for a temporary restraining order. This order briefly sets forth the reasons for and scope of that ruling.

Plaintiff-applicant is a prisoner who has been sentenced to death by the State of California and who is challenging his conviction and sentence in federal habeas corpus proceedings pending before the Court. Plaintiff contends that the State of California has failed to comply with the so-called "opt-in" provisions of 28 U.S.C. §§ 2261 and 2265, as added to Title 28 of the United States Code

by the Antiterrorism and Effective Death Penalty Act of 1996 ("Act"). Accordingly, plaintiff contends, the expedited review and other provisions of the newly created chapter 154 of Title 28 do not, and cannot, apply to cases brought under 28 U.S.C. § 2254 by prisoners challenging California judgements of death. Pending final resolution of plaintiff's rights and other legal obligations pursuant to the Act, plaintiff seeks a temporary order (1) enjoining defendants from asserting that the State of California has complied with, or is entitled to the benefits of, the provisions of Chapter 154 in any state or federal proceeding; and (2) declaring that the provisions of Chapter 154 are inapplicable to prisoners under a sentence of death imposed by the State of California.

Plaintiff further contends that the urgency and necessity of this action stem from the uncertainty whether Chapter 154 applies and the gravity of the harm that threatens the plaintiff and other members of the proposed plaintiff class as a consequence of noncompliance. Without a judicial determination of the rights and responsibilities of the parties to this action, plaintiff argues, prisoners under sentence of death by the State of California must necessarily guess as to whether and how Chapter 154 may constrain their ability to seek redress in the federal courts for deprivations of their constitutional rights. The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights.

Based on the foregoing considerations, as well as the parties' papers and oral arguments, the Court finds

that plaintiff-applicant has shown that the applicability of Chapter 154 presents a serious question of law as to which he has demonstrated a significant likelihood that he and other members of the proposed class will prevail on the merits, that he and other members of the proposed class will suffer immediate irreparable injury should this order not issue, and that the balance of hardships tips sharply in their favor. Plaintiffs are accordingly entitled to temporary relief.

Accordingly, Defendants Calderon, Farmon, Gomez, and Lungren are hereby ORDERED TO SHOW CAUSE at 3:00 p.m. on May 13, 1996, or as soon thereafter as counsel may be heard in Courtroom 12, located at 450 Golden Gate Avenue, San Francisco, why you, your agents, servants, employees, and attorneys and those in active concert or participation with you or them, should not be restrained and enjoined pending trial of this action from asserting that the State of California has complied with the provisions of new Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any prisoner under a sentence of death imposed by the State of California.

Pending hearing on and this Court's disposition of the above Order to Show Cause, you, your agents, servants, employees and attorneys, and all those in active concert with you or them ARE HEREBY RESTRAINED AND ENJOINED from asserting that the State of California has complied with or is entitled to the benefits of the provisions of new Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any prisoner under sentence of death by the State of California.

The above temporary restraining order is effective immediately without the need for plaintiffs to post a bond or security. Defendants shall file directly with chambers

and personally serve additional papers responding to the issues raised at the May 2 hearing no later than 12:00 noon, on May 7, 1996. Plaintiffs shall file and personally serve their additional papers no later then 4:30 p.m., on Thursday, May 9, 1996.

At the present time, the Court is not persuaded of the availability or propriety of temporary declaratory relief. Accordingly, plaintiff's request for such relief is denied pending the hearing on the preliminary injunction.

IT IS SO ORDERED.

DATED 5/3/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

[FILED MAY 15, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v.	)	ORDER MODIFYING
	)	& EXTENDING
ARTHUR CALDERON,	)	TEMPORARY
et al.,	)	RESTRAINING
	)	ORDER
Defendants.	)	
	)	

This case concerns the applicability of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("Act") to the State of California. Plaintiff seeks preliminary and declaratory relief concerning California's eligibility for the procedures potentially available to states under the newly created Chapter 154, as added by the Act to Title 28 of the United States Code.

On May 13, 1996, having previously granted plaintiff's application for a Temporary Restraining Order ("TRO"), the Court held a show cause hearing on whether to issue a preliminary injunction. At the close of the hearing, and good cause appearing pursuant to F.R. Civ. P. 65(b), the Court extended the TRO for an additional ten (10) days and announced that it would modify the language in the TRO. This order elaborates on that oral ruling and requests supplemental briefing from the parties on the propriety of granting final declaratory relief, in lieu

of issuing a preliminary injunction.

GOOD CAUSE EXTENSION

Pursuant to Federal Rule of Civil Procedure 65(b), the Court may, "for good cause shown," extend a TRO for a period "not to exceed 10 days." The reasons for the extension must be "entered of record." FRCP 65(b). As the parties to this action have repeatedly emphasized, resolution of this case literally may have life or death consequences for plaintiff and members of the proposed class; it also raises important questions of finality in capital cases that are of paramount concern to the State of California. The Court's decision may affect the course of federal habeas litigation for every inmate on death row in California. In light of these concerns, and given the complexity, novelty, and number of jurisdictional and statutory construction issues raised by the parties, the Court has concluded that an additional ten (10) days is necessary for it to reach a carefully considered decision in this case.

The Court is acutely aware of the urgency to the State of a prompt and appealable determination on the merits,[1] the potential for duplicative litigation created by the TRO, and the delicate comity and First Amendment issues implicated by its order. As indicated in its May 3, 1996, order, however, the Court believes that plaintiff has demonstrated a strong likelihood of success on the merits and that the balance of hardships tips sharply in plaintiff's favor. The Court also believes that maintaining the TRO in force is the best approach to minimizing duplicative

1. Since the issuance of the TRO, defendants have sought emergency stays from both the Ninth Circuit and the United States Supreme Court, and have applied for an emergency writ of mandamus to the Ninth Circuit. Each of these requests was summarily denied.

litigation over, and ensuring expeditious review of, the applicability of Chapter 154 to California. These factors provide additional reasons for extending the TRO.

MODIFICATION OF THE TRO

In the interim, the TRO shall remain in force, with one exception. Defendants have expressed serious concern regarding the TRO's potential interference with their First Amendment rights. These concerns are sufficiently weighty to warrant a change in the wording of the TRO. Accordingly, the Court hereby strikes from its May 3, 1996, order the following phrase:

> you, your agents, servants, employees and attorneys, and all those in active concert with you or them ARE HEREBY RESTRAINED AND ENJOINED from asserting that the State of California has complied with or is entitled to the benefits of the provisions of new Chapter 154 . . .

In place of this wording, the Court hereby ORDERS that the following language be inserted:

> you, your agents, servants, employees and attorneys, and all those in active concert with you or them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 . . .

SUPPLEMENTAL BRIEFING

At the May 13 hearing, both parties appeared to indicate a desire that the Court issue a final declaratory judgment as soon as possible. The parties contended that such a course not only would be the most appropriate and

expeditious way for this case to proceed, but also would potentially avoid the need for the Court to resolve some of the more difficult jurisdictional, equitable, and First Amendment issues the case poses. Federal Rule of Civil Procedure 65(a)(2) appears to provide a possible vehicle for the Court to promptly issue such declaratory relief:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

FRCP 65(a)(2).

Accordingly, the Court hereby ORDERS counsel for plaintiff and defendants each to provide supplemental briefing, not to exceed fifteen (15) pages, on the propriety of the Court consolidating the trial on the merits with the preliminary injunction application. The parties shall file such briefs *directly with chambers* and personally serve them upon opposing counsel on or before Friday, May 17, 1996, at 5:00 p.m. The Court will hear oral argument on the issue at the start of the hearing for provisional class certification, currently scheduled for Thursday, May 23, 1996, at 10 a.m.

Two issues that the Court believes might be appropriately addressed are: (1) how consolidation would affect the need for or propriety of provisional class certification; and (2) whether, if the Court does consolidate the application with the merits, the record is sufficient to allow the Court to evaluate plaintiff's *factual* contentions (i.e., Does California in fact adequately comply with the unitary review procedure allegedly authorized by its comprehensive scheme?). These suggestions are not intended to constrain the parties from

addressing the issues they deem most appropriate.

CONCLUSION

For the reasons discussed above, and good cause appearing, the Court thereby EXTENDS the TRO for an additional ten (10) days, MODIFIES the TRO as indicated, and ORDERS the parties to submit supplemental briefing on the issues and schedule stated above.

IT IS SO ORDERED.

DATED 5/15/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

[FILED MAY 24, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	No. C 96-1533 TEH
	)	
v.	)	ORDER
	)	
ARTHUR CALDERON, et al.,	)	
	)	
Defendants.	)	
	)	

This case concerns the applicability of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("1996 Act") to the State of California. Plaintiff seeks preliminary and declaratory relief concerning California's eligibility for the procedures potentially available to states under the newly created Chapter 154, as added by the 1996 Act to Title 28 of the United States Code. For the reasons discussed below, and good cause appearing, plaintiff's requests for provisional class certification, declaratory relief, preliminary injunctive relief, and to proceed *in forma pauperis* are hereby GRANTED. Defendants' expedited motion to dismiss is hereby DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-applicant is a prisoner who has been sentenced to death by the State of California and who is challenging his conviction and sentence in federal habeas

corpus proceedings pending before the Court. Plaintiff contends that the State of California has failed to comply with the 1996 Act's so-called "opt-in" provisions of 28 U.S.C. §§ 2261 and 2265. Accordingly, plaintiff contends, the expedited review and other provisions of chapter 154 do not, and cannot, apply to petitions brought under 28 U.S.C. § 2254 by prisoners challenging California judgments of death.

In the 30 days since plaintiff filed this action on April 24, 1996, the Court has held three hearings and received six rounds of briefing on the matter. On May 2, at the close of the show cause hearing on plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief," the Court granted plaintiffs' application for a temporary restraining order ("TRO"). On May 13, at the close of the hearing on plaintiff's application for a preliminary injunction, the Court modified and extended the TRO for an additional ten days. *See Ashmus v. Calderon*, No. C96-1533 TEH (N.D. Cal. May 15, 1996) (Order Modifying and Extending TRO). Yesterday, at the close of the hearing on plaintiff's expedited motion for provisional class certification, defendants' expedited motion to dismiss, and other matters raised in the parties' supplemental briefs, the Court announced that it would be issuing a brief order addressing the outstanding issues presented by the parties. This order fulfills that promise. A more complete explanation of the Court's reasoning will follow, including findings of fact and conclusions of law as required under Fed. R. Civ. Pro. 52(a).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Section 1331 confers jurisdiction upon the Court over "all civil actions arising

under the Constitution, laws, or treaties of the United States." A lawsuit "arises under" federal law if (1) federal law creates the cause of action, or (2) "the resolution of the dispute depends upon the validity, construction, or effect of federal law, so long as the federal question is a real and substantial issue." *City National Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982). Plaintiff seeks a declaratory judgment that Chapter 153, rather than the expedited provisions of Chapter 154, governs federal review of his state court conviction and death sentence. Thus, he has alleged facts sufficient to confer jurisdiction under either prong of this test: The Declaratory Judgment Act creates his cause of action, see *Samuels v. Mackell*, 401 U.S. 66, 70 (1971) (declaratory judgment is "essentially an equitable cause of action"); *Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979), and the dispute depends upon the construction and effect of the 1996 Act.

The Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3), because plaintiff has sufficiently alleged a cause of action under 42 U.S.C. § 1983

CLASS CERTIFICATION

After considering the memoranda and exhibits of the parties and the arguments of counsel, the Court finds that this matter meets the requirements of Fed. R. Civ. Pro. 23 and should be provisionally maintáined as a class action. Accordingly, it is hereby ORDERED that, pursuant to Fed. R. Civ. Pro. 23, paragraphs (a), (b)(1), and (b)(2), plaintiffs shall provisionally maintain this matter as a class action on behalf of a class consisting of the following persons:

> All prisoners who have been sentenced to death by the State of California and are currently awaiting execution pending

resolution of their state and federal challenges to their state convictions and sentences.

Plaintiff Troy A. Ashmus shall be the named class representative. The Court shall retain the power to modify, amend, or revoke the class certification throughout the pendency of the action.

DISCUSSION

The urgency and necessity of this action stem from the uncertainty whether Chapter 154 applies and the gravity of the harm that threatens the plaintiff and other members of the provisionally certified class as a consequence of noncompliance. Without a judicial determination of the rights and responsibilities of the parties to this action, prisoners under sentence of death by the State of California must necessarily guess as to whether and how Chapter 154 may constrain their ability to seek redress in the federal courts for deprivations of their constitutional rights. The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights.

California's eligibility to proceed under Chapter 154 literally may have life or death consequences for plaintiff and members of the proposed class; it also raises important questions of finality in capital cases that are of paramount concern to the State of California. The Court's decision may affect the course of federal habeas litigation for every inmate on death row in California. There can be no doubt that this case thus presents an

actual case or controversy, and is of the gravest consequences to the Parties.

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. Title I of the Act, entitled "Habeas Corpus Reform," modifies existing habeas corpus procedures contained in Chapter 153 of the Judicial Code (Title 28), and enacts a new Chapter 154, adding §§ 2261-2266 to Title 28. Chapter 154 offers a system of expedited review and other "benefits"[1] to states that qualify under either of two so-called "opt in" procedures: (1) the "post-conviction" procedure provided for in § 2261 or (2) the "unitary review" procedure provided for in § 2265. The Act, which largely codified a 1989 proposal by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases,[2] essentially establishes a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review *in return for strengthening* the right to counsel for indigent capital defendants." House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R. Rep. No. 23, 104th Cong., 1st Sess., at 10 ("House

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1. The expedited procedures available to opt-in states include a six-month time limit on the filing of federal habeas corpus petitions, limitations on amendments to petitions and their factual development, and limitations or. federal courts' power to review the merits of constitutional claims and order appropriate relief. 28 U.S. §§ 2263-2264. Moreover, for qualifying states, capital habeas matters must be "given priority by the district court and by the court of appeals over all noncapital matters." § 2266(a).

2. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) ("Powell Committee Report").

Report") (emphasis added).[3]

Defendants concede, and the Court hereby holds, that California does not qualify under § 2261's "post-conviction" procedure. Throughout this litigation, in other cases pending before federal courts in California, and in public statements, however, state officials have consistently and vigorously maintained that California does qualify under § 2265's unitary review procedure. Accordingly, defendants have threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class.

> Section 2265(a) provides in full as follows:
>
> For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

3. Although this report was issued in connection with the proposed 1995 Act, the relevant portions of the proposed 1995 Act are identical to the legislation signed into law.

28 U.S.C. § 2265(a).

The threshold question for determining compliance with § 2265 is whether the state has created "a 'unitary review' procedure." If a state has a unitary review procedure, then it qualifies under § 2265 if (1) "the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings," § 2265(a); (2) "The rule of court or statute [] provides standards of competency for appointment of such counsel," *id.*; *and* (3) the State also properly establishes the requisite mechanism for offering and appointing counsel pursuant to § 2265(b). Failure to comply with any of these mandatory requirements is fatal to a state's ability to opt-in under § 2265.

Defendants claim that California satisfies these requirements by virtue of a "comprehensive scheme of interlocking, cross-implementive provisions." The qualifying mechanism, defendants claim, became effective on June 6, 1989, and consists primarily of the following: (1) Cal. Gov't Code § 68511.5 (effective Jan. 1, 1984), (2) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" ("Rules of Court") (effective Jan. 1, 1983), (3) Rule of Court 76.5 (effective Jan. 1, 1985), (4) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (effective January 1, 1985), (5) the California Supreme Court Statement of Internal Operating Practices and Procedures ("IOPP") (Adopted Summer 1985, Revised December 1989, and in 1995), (6) the California Supreme Court Statement of Policies Regarding Cases Arising From Judgements of Death (the "June 6, 1989 Policies") (adopted June 6, 1989), and (7) *In re Clark*, 21 Cal. Rptr. 2d 509 (1993).

Although the matter is not entirely free from doubt, the Court concludes that California has a unitary review procedure, as that term is defined in the 1996 Act. The Court also concludes, however, that California's alleged comprehensive scheme fails to satisfy the remaining elements of section 2265, for several independent reasons.

First, California has no rule of court or statute that provides standards of competency for appointment of counsel in unitary proceedings. The relevant authority, Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council, is inadequate[4] because (1) it is not a rule of court or statute; (2) does not impose any binding or mandatory standards; and (3) does not require counsel to have any experience or

4. The Act's legislative history indicates that while Congress gave states latitude in establishing the appropriate mechanism and standards, it entrusted to federal courts the responsibility for determining the adequacy of these measures. *See, e.g.,* Powell Committee Report at 3242 ("[I]t is more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies . . . The final judgments as to the *adequacy* of any system for the appointment of counsel [], however, rests ultimately with the federal judiciary . . . [T]he adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation." (emphasis in original); 137 Cong. Rec. at S3220 (March 13, 1991) (Section-by-Section Analysis of the Comprehensive Violent Crime Control Act of 1991) [hereinafter "1991 Analysis") ("The latitude afforded to the states in defining specific standards of counsel competence is also desirable . . . [However], *[a]t a minimum*, the immediate benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings, and these states focus on an [sic] articulate standards of competence for such appointments.") (emphasis added); *id.* at 3222 (pointing out that proposed § 2261, codified in the 1996 Act as § 2265, "would extend the chapter to states with *adequate* unitary review procedures") (emphasis added).

competence in raising collateral issues.

Second, California's alleged "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" expressly precludes compensation for raising certain collateral issues. *See* June 6, 1989 Policies, Timeliness Standard 1-1; *In re Clark*, 21 Cal. Rptr. 509, 531-32 (1993). This limitation runs afoul of § 2265 (a)'s express requirement that the unitary review procedure authorize and provide compensation for capital defendants to "raise, in the course of direct review of the judgement, *such claims as could be raised* on collateral attack." § 2265(a) (emphasis added). The limitation also creates an objectively deficient standard for the performance of counsel appointed to seek collateral relief. As the Ninth Circuit has noted, the meaningful assistance of counsel in collateral proceedings is important precisely because it is necessary to enable prisoners to "assert *all* possible violations of his constitutional rights" and thus avoid the risk of defaulting claims that could have reasonably been discovered through diligent investigation. *Brown v. Vasauez*, 952 F.2d 1164, 1167 (9th Cir. 1991) (emphasis added), *cert. denied*, 503 U.S. 1011 (1992).

Third, California fails to make a bona fide offer of counsel as required by § 2265(b) & 2261(c). By defendants' own admission, "Every inmate who is awaiting appointment of counsel *has* been 'offered' counsel and that offer has been accepted; what is pending is the appointment itself." Defendants' 1st Opp. Mem. at 16 (emphasis in original). The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), as incorporated by § 2265(b), that the state's procedure "must provide for . . . appointment of one or more counsels to represent the prisoner *upon a finding* that the

prisoner is indigent and accepted the offer . . ." (emphasis added); *see also* 1991 Analysis, 137 Cong. Rec. at S3220 (March 13, 1991) ("*At a minimum*, the *immediate* benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings, and these states focus on an [sic] articulate standards of competence for such appointments.") (emphasis added).

DECLARATORY JUDGMENT

"In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a); *American States Insurance Co. v. Kearns*, 15 F.3 142, 143 (9th Cir. 1994). This case presents an actual controversy that is within the Court's jurisdiction. Accordingly, for the reasons discussed above, and good cause appearing, the Court hereby DECLARES that Chapter 154 of Title 28 of the United States Code does not, at the present time, apply to California, because California has failed to comply with the opt-in provisions of 28 U.S.C. § 2261 or 2265. The Court further declares that the provisions of Chapter 154 are not applicable to the federal habeas corpus proceedings of any members of the provisionally certified class. This declaration shall remain in effect until and unless the State of California demonstrates to this Court that it has complied with the opt-in provisions of 28 U.S.C. 2261 or 2265.

PRELIMINARY INJUNCTION

In the Ninth Circuit, in order to be entitled to preliminary injunctive relief, a plaintiff must show one of the following:

> [E]ither (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [the plaintiff's] favor.

EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 752 (9th Cir. 1991).

Plaintiffs have satisfied both prongs of this test. Prior to issuance of the Court's TRO, defendants' threats to invoke Chapter 154's expedited review provisions were causing plaintiffs to fore-to rights to which they are entitled under Chapter 153. Defendants' assertions during the course of this litigation leave little room for doubt that, absent injunctive relief, they will continue to make such threats and assertions. While Defendants certainly have a fundamental First Amendment right to express their views in this regard, the Court concludes that the manner in which they have done so has put plaintiffs in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so.

As a practical matter, defendants' assertions were securing for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that Congress required states to give plaintiffs as a quid pro quo for receiving such benefits. For these reasons, defendants' threats were effectively depriving plaintiffs of their rights under chapter 153, and, arguably, under the Due Process Clause as well. Whether, as plaintiffs assert, this effective deprivation constitutes "deprivation" within the meaning of 42 U.S.C. § 1983 appears to be a difficult question of First Impression. However, at the least, plaintiff has raised serious questions in this regard. Given the balance of hardships in this case

and the potential life or death consequences at stake, the Court is obligated to resolve any doubts in plaintiffs' favor and to grant a preliminary injunction.

The Court finds that injunctive relief is necessary and proper to effectuate the terms of its declaratory judgment. Accordingly, the Court harbors no doubt regarding its power to issue injunctive relief. 28 U.S.C. § 2202; *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-32 (1975). Rather, the Court's uncertainty in this regard stems from questions defendants have raised over whether plaintiffs have stated a viable cause of action under 42 U.S.C. § 1983. It is well-settled that, in appropriate circumstances, state officials' threats to assert a legal position can give rise to a cause of action under § 1983. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 683 n. 3 (1977); *Steffel v. Thompson*, 415 U.S. 452, (1974); *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wa. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996). Focussing on the nature of state actions in these cases, defendants have pointed out several reasons why they are distinguishable from the instant case.

The Court recognizes that applying the principles underlying *Steffel* and its progeny to the instant case represents a novel application of these cases. However, the Court believes that defendants have misperceived the relevance of these cases to the instant action. The relevant focus is not the nature of state action,[5] but the nature of the harm that *Steffel* and other courts have held to be cognizable under § 1983. In *Steffel*, the uncertainty

5. Plaintiffs have adequately alleged the presence of state action, as defendants, at one point at least, seemed to concede. *See* Defendants' 2d Opp. Mem. at 4 ("[Plaintiff] observes that state officials 'act under color of state law' when they litigate, a proposition we do not dispute.")

caused by state officials' threats to prosecute plaintiff under an allegedly unconstitutional statute caused plaintiff to forego his First Amendment rights to free speech. In *Thorsted*, the uncertainty created by state officials' threats to enforce an allegedly unconstitutional term limits measure caused plaintiffs to forego rights secured by the First and Fourteenth Amendments, as well as the Qualifications Clause. In the instant case, the uncertainty created by defendants threats is causing plaintiffs to forego their rights, under chapter 153, not to be executed without a federal court's determination that their conviction and sentence does not offend the U.S. Constitution.

Defendants have appropriately cautioned the Court that in extending well-established precedent to issues of first impression, courts should be mindful of the need to establish a principled basis on which to limit that extension. This case readily provides such a limiting principle. As the Supreme Court has repeatedly emphasized over the past two decades, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), and as Congress' enactment of Chapter 154 vividly exemplifies, "death is different."

For the foregoing reasons, the Court concludes that it is necessary to convert the TRO into a preliminary injunction. Accordingly, and good cause appearing, defendants their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any prisoner under sentence of death by the State of California.

The foregoing discussion compels the conclusion that defendants motion to dismiss must be, and hereby is, DENIED. However, defendants have also requested a temporary stay of the Court's injunctive relief. In deference to the important state interests that defendants have raised, and in light of the undersigned's unavailability next week, the Court believes that a limited stay of the injunction is appropriate. Accordingly, the Court hereby stays this injunction for a period of ten (10) days.

IFP APPLICATION

Plaintiff has requested permission to proceed *in forma pauperis* in the above-captioned case, due to his poverty. The Court has previously permitted Mr. Ashmus to proceed *in forma pauperis* in his pending federal habeas corpus proceedings, *Ashmus v. Calderon*, No C-93-0594. On the basis of his affidavit in that case, the Court will permit Mr. Ashmus to proceed *in forma pauperis* in the instant case, pending submittal of a new affidavit by Mr. Ashmus. Counsel for plaintiff is directed to submit such an affidavit as soon as possible, and in any event, not later than 10 days from the issuance of this order.

CONCLUSION

For the reasons discussed above, and good cause appearing, it is hereby ORDERED that

(1) Plaintiff's request for provisional class certification is GRANTED;

(2) Plaintiff's request for final declaratory relief is GRANTED;

(3) Plaintiff's request for preliminary injunctive relief is GRANTED;

(4) Plaintiff's request to proceed *in forma pauperis* is GRANTED; and

(5) Defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

DATED 5/24/96 /s/Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[FILED MAY 31, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al., Plaintiffs, v. **ARTHUR CALDERON, Warden of California State Prison at San Quentin, et al.,** Defendants.	C-96-1533 TEH **ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL**

Defendants Arthur Calderon, Teena Farmon,

James Gomez, and Daniel Lungren respond to the complaint filed on April 24, 1996, in this action with the following admissions, denials, and allegations. Except as expressly admitted, defendants deny each and every allegation of the complaint.

FIRST DEFENSE

I.

Defendants admit the allegation of paragraph 1 that plaintiff purports to bring this action pursuant to 42. U.S.C. § 1983 but deny that it is properly brought under that section. Defendants also deny any implicit allegation in paragraph 1 that the case is properly before this Court as a class action or certifiable as such. Defendants admit plaintiff's general recital of the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, and further admit that he is under sentence of death and "seeks a judicial determination that the State of California does not qualify as an opt-in jurisdiction."

II.

Defendants deny the allegations of paragraph 2; they do not intend "to invoke the provisions in Chapter 154 *in all* current and future federal habeas corpus proceedings involving California judgments."

III.

Defendants deny the allegations of paragraph 3.

IV.

Defendants deny the allegations of paragraph 4.

V.

Defendants deny the allegations of paragraph 5.

VI.

Defendants deny the allegations of paragraph 6.

VII.

Defendants deny the allegations of paragraph 7.

VIII.

Defendants admit the allegation of paragraph 13 that 28 U.S.C. § 1331 confers jurisdiction over cases arising under the Constitution and laws of the United States but deny that the Court has Article III jurisdiction in this case because of the absence of an actual case or controversy.

IX.

Defendants deny the allegations of paragraph 9.

X.

Defendants admit that the Court is empowered to declare the rights and other legal relations of parties pursuant to 28 U.S.C. § 2201, and to effect appropriate relief under 28 U.S.C. § 2202. Defendants deny that this case involves an actual case or controversy within the Court's jurisdiction, that plaintiff or any alleged class member is entitled to relief under 42 U.S.C. § 1983, or that defendants, while acting under color of state law, have deprived plaintiff or any alleged class member of

constitutional rights.

XI.

Defendants admit the allegation of paragraph 11.

XII.

Defendants admit the allegation of paragraph 12.

XIII.

Defendants admit the allegations of paragraph 13(A), (F), (G), and (H). Defendants admit the remaining allegations of paragraph 13 except as follows: defendants deny any implied allegation of paragraph 13(B) that the appointment of Linda F. Robertson was limited to the automatic appeal; with respect to 13(C), the date of affirmance occurred on December 5, 1991; as to 13(D), although the petition for writ of certiorari was timely filed, it contained untimely claims; as to 13(E), defendants deny that plaintiff's "institut[ion] of federal proceedings" on February 17, 1993, constituted anything more than the invocation of this Court's habeas corpus jurisdiction.

XIV.

Defendants admit the allegations of paragraph 14 except for any allegation, which defendants deny, that Defendant Calderon acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XV.

Defendants admit the allegations of paragraph 15 except for any allegation, which defendants deny, that

Defendant Farmon acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XVI.

Defendants admit the allegations of paragraph 16 except for any allegation, which defendants deny, that Defendant Gomez acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XVII.

Defendants admit the allegations of paragraph 17 except for any allegation, which defendants deny, that Defendant Lungren acts or acted under color of state law in relation to any cause of action alleged in this complaint.

XVIII.

Defendants admit the allegation of paragraph 18 that plaintiff purports to bring a class action pursuant to 42. U.S.C. §§ 1983, 28 U.S.C. § 2201, and Rules 23, 57, and 65 of the Rules of Civil Procedure, but deny that he does so properly or that he is entitled to relief or class certification on any basis.

XIX.

Defendants deny the allegations of paragraph 19.

XX.

Defendants deny the allegations of paragraph 20 that a proper class exists for purposes of a class action in this case, and that the number of present and future California inmates awaiting execution makes joinder

impracticable within the meaning of Federal Rule of Civil Procedure 23(a)(1). Defendants admit as fair estimates the allegations of the approximate number of current death row inmates, inmates awaiting appointment of counsel in state court following conviction, and inmates added monthly to death row.

XI.

Defendants deny the allegations of paragraph 21 and its subparts.

XXII.

Defendants deny the allegations of paragraph 22 and its subparts.

XXIII.

Defendants deny the allegations of paragraph 23.

XXIV.

Defendants deny the allegations of paragraph 24.

XXV.

Defendants lack sufficient information to formulate a belief in the truth or falsity of the allegation of paragraph 25, and deny the allegation on that basis.

XXVI.

Defendants deny the allegations of paragraph 26.

XXVII.

Defendants deny the allegations of paragraph 27.

XXVIII.

Defendants admit the allegations of paragraph 28.

XXIX.

Defendants admit the allegation of paragraph 29.

XXX.

Defendants deny that the term "opt-in" as alleged in paragraph 30 is an appropriate characterization.

XXXI.

Defendants deny that the term "opt-in" as alleged in paragraph 31 is an appropriate characterization.

XXXII.

Defendants deny the allegations of paragraph 32 that application of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 depends strictly on whether states "have, and comply with, statutes or court or agency rules." Defendants admit that application of the new provisions of Chapter 154 imposes more restrictive rules and standards to federal habeas corpus petitions by death row inmates challenging their state judgments.

XXXIII.

Defendants deny the allegation of paragraph 33.

XXXIV.

Defendants deny the allegation of paragraph 34.

XXXV.

Defendants deny the allegation of paragraph 35.

XXXVI.

Defendants admit the allegation of paragraph 36.

XXXVII.

Defendants lack sufficient information to formulate a belief in the truth or falsity of the allegation of paragraph 37 as respects appointments before 1977. Defendants deny the allegation as to appointments from 1977 onwards.

XXXVIII.

Defendants admit the allegations of the second and third sentence of paragraph 38 as a generally correct statement of California law, and deny each and every other allegation of paragraph 38.

XXXIX.

Defendants deny the allegations of paragraph 39.

XXXX.

Defendants deny the allegations of paragraph 40.

XXXXI.

Defendants deny the allegation of paragraph 41.

XXXXII.

Defendants deny the allegation of paragraph 42.

XXXXIII.

Defendants deny the allegation of paragraph 43.

XXXXIV.

Defendants deny the allegations of paragraph 44.

XXXXV.

Defendants deny that plaintiff or any alleged class member is entitled to the relief requested in paragraph 45.

XXXXVI.

Defendants deny that plaintiff or any alleged class member is entitled to the relief requested in paragraph 46.

XXXXVII.

Defendants deny that plaintiff or any alleged class member is entitled to the relief requested in paragraph 47.

XXXXVIII.

Defendants deny that plaintiff or any alleged class

member is entitled to the relief requested in paragraph 48.

XXXXIX.

Defendants deny that plaintiff or any alleged class member is entitled to the relief, costs, disbursements, or attorneys fees requested in paragraph 49.

XXXXX.

Defendants deny that plaintiff or any alleged class member has been damaged, injured, or deprived of any federal right justifying relief in equity or law, or is entitled to the relief sought in paragraph 50.

SECOND DEFENSE

XXXXXI.

Defendants allege that the complaint fails to state any claim upon which relief can be granted.

THIRD DEFENSE

XXXXXII.

Defendants allege that the complaint fails to state a claim against each answering defendant.

FOURTH DEFENSE

XXXXXIII.

Defendants deny that they have deprived any person of any right, privilege, or immunity guaranteed by the Constitution or laws of the United States or the State of California, and deny that plaintiff or any alleged class member has been deprived of any such right, privilege, or immunity.

FIFTH DEFENSE

XXXXXIV.

Defendants allege that if they performed any of the acts or omissions alleged in the complaint, at the time of such act or omission they were performing a discretionary function and did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Defendants therefore assert that they are immune from liability.

SIXTH DEFENSE

XXXXXV.

Defendants allege that at the time of the events alleged in the complaint, there were no clearly established federal rights, of which defendants knew or should have known, which required defendants to act differently from the way they did, in fact, act. Defendants therefore allege that they are immune from liability.

SEVENTH DEFENSE

XXXXXVI.

Defendants allege that the relief sought in the complaint is barred by the Eleventh Amendment to the United States Constitution.

EIGHTH DEFENSE

XXXXXVII.

Defendants allege that no imputed liability exists between public officers in actions under the Federal Civil Rights Act.

NINTH DEFENSE

XXXXXVIII.

Defendants allege that no imputed liability exists between a public officer and his or her employing public entity in actions under the Federal Civil Rights Act.

TENTH DEFENSE

XXXXXIX.

Defendants allege that the Court lacks subject matter jurisdiction to consider the claims of the complaint.

ELEVENTH DEFENSE

XXXXXX.

Defendants allege that the Court should abstain

from adjudicating any issue relating to the meaning or application of California law or procedure until the state courts have been given a fair opportunity to address the issue.

TWELFTH DEFENSE

XXXXXXI.

The complaint and each cause of action fail to allege facts sufficient to constitute a cause of action for attorneys fees.

DEMAND FOR JURY TRIAL

Defendants hereby demand a trial before a jury on all issues in the complaint triable to a jury.

WHEREFORE, defendants pray that:

1. Judgment be rendered in favor of defendants and against plaintiff;

2. Plaintiff take nothing by the complaint;

3. Defendants be awarded their costs of suit incurred herein; and

4. Defendants be awarded such other and further relief as the Court may deem necessary and proper.

Dated: May 31, 1996.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

DANE R. GILLETTE
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

/s/ Morris Beatus
MORRIS BEATUS
Deputy Attorney General

Attorneys for Defendants

[SERVICE DOCUMENTATION OMITTED]

(ORDER LIST: 522 U.S.)

FRIDAY, DECEMBER 5, 1997

CERTIORARI GRANTED

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97-391 CALDERON, WARDEN, ET AL. V. ASHMUS, TROY, ETC.

The motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* is granted. The motion of respondent for leave to proceed in *forma pauperis* is granted. The petition for writ of certiorari is granted limited to Questions 1 and 2 presented by the petition. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 16, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 13, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 13, 1998. Rule 29.2 does not apply.